

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ZAW ZAW,

Plaintiff,

v.

KEVIN BIRUSINGH, M.D., and THE IOWA
CLINIC,

Defendants.

KEVIN BIRUSINGH, M.D., and THE IOWA
CLINIC,

Third-Party Plaintiffs,

vs.

LANGUAGEtech, INC.,

Third-Party Defendant.

CASE NO. LACL139628

JURY INSTRUCTIONSOriginalFILED
POLK COUNTY
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CLERK DISTRICT COURT

STATEMENT OF THE CASE

Plaintiff Zaw Zaw alleges Defendant Kevin Birusingh, M.D., who was employed by The Iowa Clinic, was negligent in his medical care and treatment of Zaw Zaw and that this alleged negligence caused injuries to Zaw Zaw.

Dr. Birusingh denies he was negligent and denies that his alleged negligence caused any injuries to the Plaintiff Zaw Zaw. Dr. Birusingh asserts that if Plaintiff was injured, any injuries were caused by the fault of other parties.

Defendants Dr. Birusingh and The Iowa Clinic assert that if Plaintiff was injured, any injuries were caused by Third Party Defendant LANGUAGEtech, Inc. and that LANGUAGEtech, Inc. was negligent. LANGUAGEtech, Inc. provided interpretation services for Zaw Zaw's medical appointments with Dr. Birusingh. LANGUAGEtech, Inc. denies that it was negligent and that any alleged negligence caused damage to the Plaintiff.

Dr. Birusingh and LANGUAGEtech, Inc. assert that, to the extent Plaintiff Zaw Zaw was injured, any injuries were caused by Zaw Zaw's negligence.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law that I will now give you.

INSTRUCTION NO. 1

My duty is to tell you what the law is. Your duty is to accept and apply this law and to decide all fact questions.

The order in which I give these instructions is not important. You must consider all of the instructions together because no one instruction includes all of the applicable law.

Do not be influenced by any personal likes or dislikes, sympathy, bias, prejudices or emotions.

INSTRUCTION NO. 2

Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

INSTRUCTION NO. 3

You shall base your verdict only upon the evidence in these instructions.

Evidence is:

1. Testimony in person or by deposition.
2. Exhibits received by the court.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

INSTRUCTION NO. 4

Certain deposition testimony has been played into evidence from videotape depositions. A deposition is testimony taken under oath before the trial and preserved in writing or on videotape. Consider that testimony as if it had been given in court.

INSTRUCTION NO. 5

You will decide the facts from the evidence. Consider the evidence using your observations, common sense, and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and,
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

INSTRUCTION NO. 6

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the court and court staff. This includes using the Internet to research events or people referenced in the trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this state and you will have done an injustice. It is very important that you abide by these rules. It is important that we have your full and undivided attention during this trial.

INSTRUCTION NO. 7

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Question 7

Are Dr. B:rusingh + Iowa
clinic joint or can a
% be assigned to each?

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There is no direct claim for negligence or fault against The Iowa Clinic. Therefore, you cannot assign a percentage of fault to The Iowa Clinic.

You are only to consider Dr. Birusingh's conduct, not the conduct of The Iowa Clinic or any other actor, in assessing if he was negligent or assigning fault, if any, to Dr. Birusingh.



Sarah Crane

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INSTRUCTION NO. 8

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

INSTRUCTION NO. 9

You have heard evidence claiming a witness made statements before this trial while not under oath which were inconsistent with what the witness said in this trial. Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

INSTRUCTION NO. 10

You have heard evidence claiming a witness made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe the witness. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

INSTRUCTION NO. 11

You have heard evidence claiming a party to the case made statements before this trial while under oath and while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case the same as if the party had made it under oath during the trial.

If you find such a statement was made and was inconsistent with the party's testimony during the trial you may also use the statement as a basis for disregarding all or any part of the party's testimony during the trial but you are not required to do so. You should not disregard the party's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

INSTRUCTION NO. 12

In these instructions I will be using the term “fault.” Fault means one or more acts or omissions towards the person of the actor or of another which constitutes negligence or unreasonable failure to mitigate damages.

INSTRUCTION NO. 13

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of all parties and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each party's fault contributed to the damages.

INSTRUCTION NO. 14

In these instructions, I will also be using the term “cause.” The conduct of a party is a factual cause of harm when the harm would not have occurred absent the conduct. There can be more than one cause of an injury or damage.

INSTRUCTION NO. 15

Plaintiff claims that Kevin Birusingh, M.D. is liable for alleged medical negligence. Medical negligence is explained to you in Instruction No. 16. As to Defendant Kevin Birusingh, M.D., the Plaintiff must prove all of the following propositions:

1. Defendant Kevin Birusingh, M.D. was negligent:
 - a. In his communication with Plaintiff Zaw Zaw; or
 - b. In failing to obtain informed consent from Plaintiff Zaw Zaw.
2. The alleged negligence was a cause of damage to Plaintiff.
3. The nature and extent of damages.

If Plaintiff has failed to prove all of these propositions, Plaintiff is not entitled to damages and your verdict will be in favor of the Defendant Kevin Birusingh. If the Plaintiff has proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction Nos. 19, 20, and 21.

INSTRUCTION NO. 16

Dr. Birusingh must use the degree of skill, care, and learning ordinarily possessed and exercised by urologists in similar circumstances. A violation of this duty is negligence.

You must determine the degree of skill, care, and learning required by Dr. Birusingh only from his opinions or those of the physicians who have testified as expert witnesses as to such standard.

A physician's conduct must be viewed in light of the circumstances existing at the time of treatment and not retrospectively.

INSTRUCTION NO. 17

To prove a failure to obtain informed consent, Zaw Zaw must prove all of the following propositions:

1. The existence of material information concerning the vasectomy. Material information is information that would be significant to a reasonable patient's decision to consent to the procedure. Material information includes the risks of, alternatives to, and consequences of having or not having the procedure.
2. Material information concerning the vasectomy was unknown to Zaw Zaw.
3. Dr. Birusingh failed to disclose material information concerning the vasectomy to Zaw Zaw.
4. Disclosure of material information concerning the vasectomy would have led a reasonable patient in Zaw Zaw's position to reject the treatment.

INSTRUCTION NO. 18

The written consent for sterilization signed by Plaintiff Zaw Zaw creates a presumption that informed consent was given.

INSTRUCTION NO. 19

Defendant Kevin Birusingh, M.D. claims that Third-Party Defendant LANGUAGEtech, Inc. may have been negligent. Negligence is explained to you in Instruction No. 22. In order to prove this claim, Defendant Kevin Birusingh, M.D., must prove all of the following propositions:

1. LANGUAGEtech, Inc. was negligent in the provision of interpretation services.
2. LANGUAGEtech, Inc.'s negligence was a cause of damage to the Plaintiff

If the Defendant has failed to prove these propositions, Defendant has not proved their defense. If Defendant has proved these propositions, then you will assign a percentage of fault against the Third-Party Defendant LANGUAGEtech, Inc. and include Third-Party Defendant LANGUAGEtech, Inc.'s fault in the total percentage of fault found by you answering the special verdicts.

INSTRUCTION NO. 20

Defendant Kevin Birusingh, M.D. and Third-Party Defendant LANGUAGEtech, Inc. claim that Plaintiff Zaw Zaw was negligent. Negligence is explained to you in Instruction No. 22. To prove this claim, Defendant and Third-Party Defendant must prove all of the following propositions:

1. Plaintiff Zaw Zaw was negligent:
 - a. In his communication with Dr. Birusingh regarding Zaw Zaw's medical care and treatment, or
 - b. In failing to actively participate in his own medical care.
2. Plaintiff Zaw Zaw's negligence was a cause of damage to the Plaintiff

If the Defendant and Third-Party Defendant have failed to prove these propositions, they have not proved their defense. If Defendant and Third-Party Defendant have proved these propositions, then you will assign a percentage of fault against Plaintiff Zaw Zaw and include Plaintiff Zaw Zaw's fault in the total percentage of fault found by you answering the special verdicts.

INSTRUCTION NO. 21

Defendant Kevin Birusingh, M.D. and Third-Party Defendant LANGUAGEtech, Inc. claim Plaintiff Zaw Zaw was at fault for failing to mitigate his damages by not exercising ordinary care to obtain reasonable medical treatment, specifically, by failing to have his vasectomy reversed if he in fact did not want a vasectomy.

Plaintiff has a duty to exercise ordinary care to reduce, minimize, or limit his damages. However, Plaintiff has no duty to do something that is unreasonable under the circumstances, such as undergo serious or speculative medical treatment, undertake action which is unreasonably expensive or intrusive, or undertake action which imposes unreasonable inconvenience.

To prove Defendant Kevin Birusingh, M.D.'s and Third-Party Defendant LANGUAGEtech, Inc.'s claim of failure to mitigate, they must prove all of the following:

1. There was something Plaintiff Zaw Zaw could do to mitigate his damages;
2. Requiring Plaintiff Zaw Zaw to do so was reasonable under the circumstances;
3. Plaintiff Zaw Zaw acted unreasonably in failing to undertake the mitigating activity; and
4. Plaintiff Zaw Zaw's failure to undertake the mitigating activity caused an identifiable portion of his damages.

If Defendant Kevin Birusingh, M.D. and Third-Party Defendant LANGUAGEtech, Inc. have proved all of these numbered propositions, then Defendant Kevin Birusingh, M.D. and Third-Party Defendant LANGUAGEtech, Inc. have proved this defense, and you shall assign a percentage of fault to Plaintiff Zaw Zaw for the time period after the failure to mitigate. This amount will be used in answering the special interrogatory in the verdict. If Defendant Kevin Birusingh, M.D. and Third-Party Defendant LANGUAGEtech, Inc. have failed to prove one or more of these numbered propositions, then they have not proved Plaintiff Zaw Zaw failed to mitigate his damages.

INSTRUCTION NO. 22

As to Plaintiff and LANGUAGEtech, Inc., “negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

INSTRUCTION NO. 23

After you have compared the conduct of all parties, if you find Plaintiff Zaw Zaw, was at fault and his fault was more than 50% of the total fault, Plaintiff cannot recover damages. However, if you find Plaintiff Zaw Zaw's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Plaintiff Zaw Zaw's fault. You should not apply the percentages to the total amount of damages. I will do that after I receive your verdict form.

INSTRUCTION NO. 24

The mere fact that the Plaintiff alleged an injury or harm does not mean a party was negligent.

INSTRUCTION NO.25

The fact that Defendant The Iowa Clinic and Third-Party Defendant LANGUAGEtech, Inc. are corporations should not affect your decision. All entities are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any person.

INSTRUCTION NO. 26

LanguageTech is liable for the negligent acts, if any, of interpreters Noel Siama and Jeremiah Puia.

A finding against Kevin Birusingh, M.D. is also a finding against The Iowa Clinic.

INSTRUCTION NO. 27

If you find Plaintiff Zaw Zaw is entitled to recover damages, you shall consider the following items:

1. Past Loss of Function of the Body: Loss of function of the body from the date of injury to the present time. Loss of function is the inability of a particular part of body to function in a normal manner.
2. Future Loss of Function of the Body: The present value of future loss of function of the body.
3. Past Physical and Mental Pain and Suffering: Physical and mental pain and suffering from the date of injury to the present time. Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort. Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.
4. Future Physical and Mental Pain and Suffering: The present value of future physical and mental pain and suffering.

The amount you assess for physical and mental pain and suffering in the past and future and loss of function of the body in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

The amounts, if any, you find for each of the above items will be used to answer the verdict form.

INSTRUCTION NO. 28

Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiff for future loss.

INSTRUCTION NO. 29

In arriving at a percentage of fault or an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to a percentage of fault or an item of damage and agreeing in advance that the average of those estimates shall be your percentage of fault or item of damage.

INSTRUCTION NO. 30

A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Zaw Zaw is an additional 38.59 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Zaw Zaw's health, habits, occupation, and lifestyle, when deciding issues of future damages.

INSTRUCTION NO. 31

Upon retiring, you shall select a foreperson. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but judges—judges of the facts. Your sole interest is to find the truth and do justice.

INSTRUCTION NO. 32

Occasionally, after a jury retires to the jury room, the members have questions. I have prepared the instructions after carefully considering this case with the parties and lawyers. I have tried to use language which is generally understandable. Usually questions about instructions can be answered by carefully re-reading them. If, however, any of you feel it necessary to ask a question, you must do so in writing and deliver the question to the court attendant. I cannot communicate with you without first discussing your question and potential answer with the parties and lawyers. This process naturally takes time and deliberation before I can reply. The foreperson shall read my response to the jury. Keep the written question and response and return it to the Court with the verdict.

The court attendant who has been working with me on this case is in the same position as I am. She has taken an oath not to communicate with you except to ask if you have agreed upon a verdict. Please do not put her on the spot by asking her any questions. You should direct your questions to the Court and not to the court attendant.

INSTRUCTION NO. 33

I am giving you one verdict form. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict must be signed by your foreman or forewoman.

After deliberating for six hours, excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the answers to the questions. In that case, the verdict must be signed by all seven jurors who agree.

When you have agreed upon the verdict and appropriately signed it, tell the Court Attendant.